No. 82-1723

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, et al.,
Respondents.

TRUCKEE-CARSON IRRIGATION DISTRICT'S BRIEF IN OPPOSITION

JOHNSON & ADAMS, LTD.
JAMES W. JOHNSON, JR.
111 California Avenue
Reno, NV 89509
Telephone: (702) 323-8616

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation
FREDERICK G. GIRARD*
JANET K. GOLDSMITH
ANDREA M. MILLER
ROBIN LESLIE STEWART
*COUNSEL OF RECORD
555 Capitol Mall, Suite 900
Sacramento, CA 95814
Telephone: (916) 444-8920

Attorneys for Truckee-Carson Irrigation District

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. We submit that the Questions Presented by the Pyramid Lake Paiute Tribe of Indians are not presented by the record in this case. This is an action to quiet title to the use of the waters of the Carson River. The initial Question Presented insofar as the Tribe is concerned is whether a *non-party* who has no interest in or claim to the waters of the Carson River and whose rights to use the waters of the Truckee River cannot be impaired by the decision in this case has sufficient interest and standing to intervene and seek a writ of certiorari in this court to review that decision.

2. Was the district court correct in determining the Newlands Project water duty on the basis of beneficial use, that is, the amount of water reasonably and economically required to irrigate the crops, when some of the project farmers' water right applications set forth a lower water duty which had never been implemented or followed and which would not provide sufficient water to irrigate the crops throughout the irrigation season.

3. Whether the district court erred in providing in the Administrative Provisions of its decree that applications for changes in the place of diversion or manner or place of use of the waters rights in Nevada adjudicated therein, including the project farmers' water rights, were to be initially directed to the Nevada State Engineer for approval.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities Cited

Statutes

Other Authorities

No. 82-1723

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

VS.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, et al.,
Respondents.

TRUCKEE-CARSON IRRIGATION DISTRICT'S BRIEF IN OPPOSITION

1. THE TRIBE'S STATUS AND PRIOR MOTIONS TO INTERVENE

At the onset it should be emphasized that the Pyramid Lake Paiute Tribe of Indians is not a party in this action, and that two prior attempts by the Tribe to intervene in this case have been rejected.

On March 4, 1968, the Pyramid Lake Paiute Tribe of Indians filed a Motion to Intervene as a Defendant, Counterclaimant and Crosscomplainant in the case. This motion was denied by the district court on January 3, 1969. Appendix G., Tribe's Petition at App. 107-112. That denial was affirmed by the Court of Appeals. Appendix H, Tribe's Appendix at App.113-122; *United States v. Alpine Land and Reservoir Company* 431 F.2d 763 (9th Cir. 1970);

rehearing denied 431 F.2d 763 (9th Cir. 1970); cert. denied 401 U.S. 912 (1971). Again, on February 12, 1983, after the time for the filing of petitions for rehearing had expired, the Pyramid Lake Paiute Tribe of Indians submitted to the Ninth Circuit Court of Appeals a Motion to Intervene or to Be Substituted as a Party for the United States and a proposed Petition for Rehearing and Suggestion for Rehearing in Banc. This motion was denied by the Court of Appeals on April 1, 1983. Appendix B., Tribe's Petition at App. 20. The Tribe did not seek this Court's review of that denial.

2. JURISDICTIONAL ISSUE

The judgment of the Ninth Circuit Court of Appeals was entered on January 24, 1983. By writ of certiorari granted upon the petition of a *party*, cases in the court of appeals may be reviewed by this Court pursuant to 28 U.S.C. § 1254(1). In this case, no petition for writ of certiorari was filed by any *party* within 90 days following the entry of the judgment of the Court of Appeals, and the order on mandate from that judgment has now been entered. See Appendix A attached hereto.

While in some unusual situations non-parties have been treated as parties and permitted to intervene and file a petition for writ of certiorari under 28 U.S.C. 1254(1), this is not the type of case in which such intervention has been allowed. *See generally* Stern & Gressman (5th ed.) *Supreme Court Practice* § 6.17 at 435-436 (1978) and cases cited. Here the action was not commenced on behalf of the Indians, they are not the real party in interest, and they claim no right to use the waters of the Carson River which are the subject of this quiet title suit. Under these

circumstances there is no basis to treat the Tribe as a party and no statutory jurisdiction for the Tribe's requested review of the decision of the Court of Appeals, which has been accepted by *all* of the parties to the case.

3. THE PROCEEDINGS BEFORE THE DISTRICT COURT

This is a quiet title suit which adjudicated the rights to use the waters of the Carson River in Nevada and California.

The complaint was filed by the United States on May 11, 1925. In brief, the United States alleged that it had a right to 5,000 cubic feet per second of the waters of the Carson River for its Newlands Project with a priority of July 2, 1902. The United States prayed for a decree quieting its rights and determining the relative rights of the defendants. *See* Complaint filed on May 11, 1925. The defendants, who were all the upstream users of the waters of the Carson River and its tributaries in Nevada and California, were served and the issues were joined.

There were two trials before the district court. The first trial commenced on April 16, 1929 and continued intermittently up to and including November 19, 1940. *See* page 17 of Plaintiff's Opening Brief filed on October 8, 1941. The second trial commenced on June 4, 1979.

In the 1929-1940 trial Truckee-Carson Irrigation District (hereinafter "TCID") did not represent the interest of the Newlands Project farmers and those farmers were not parties in the case. In the 1979 trial, however, TCID did represent the interests of the project farmers for in 1975 those farmers were joined as a class of defendants,

and TCID was ordered by the court to represent those class defendants in this case. *See* Order filed June 5, 1975.

Following the first trial and on March 19, 1941, the court appointed a Special Master to review the evidence and to make proposed findings of fact, conclusions of law and final decree to the court. *See* page 17 of Plaintiff's Opening Brief filed on October 8, 1941.

On June 28, 1951, the Special Master presented Proposed Findings of Fact, Conclusions of Law and Decree to the court and, on July 14, 1958, amendments thereto. *See* June 28, 1951 letter from John V. Mueller to the Honorable Roger T. Foley; Proposed Findings of Fact, Conclusions of Law and Decree filed on September 18, 1951; Amended Proposed Findings of Fact and Conclusions of Law and Decree filed on July 14, 1958. These Findings of Fact proposed an applied water duty of 5 acre-feet per acre for all lands on which the waters of the Carson River were used.

For about 15 years the action remained fairly dormant. On February 15, 1974, the court entered an order directing the parties to file their written objections to the Special Master's proposed Findings of Fact, Conclusions of Law and Decree. *See* Order To Show Cause filed on February 15, 1974. Objections to the Special Master's proposed Findings of Fact, Conclusions of Law and Decree were filed by the United States, TCID and most of the upstream defendants, and on June 4, 1979 the trial concerning those objections, and the other issues as stated in the Pretrial Order commenced.

There were ten days of trial. The great bulk of the testimony and exhibits at this trial concerned the proper water

duty, both for the project lands and for the lands above the Newlands Project.

On October 28, 1980, the district court filed its Opinion, Appendix F, Tribe Appendix at App. 69-107; *United States v. Alpine Land & Reservoir Co., et al.*, 503 F.Supp. 897 (D. Nev. 1980), and its Findings of Fact and Conclusions of Law. The district court determined that the Newlands Project water duty was 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the benchlands. For the lands above the Newlands Project it determined water duties which ranged from 4.5 acre-feet per acre to 9 acre-feet per acre. The Final Decree was formally entered on December 18, 1980. On February 12, 1981 the United States filed its Notice of Appeal.

4. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

The opinion of the United States Court of Appeals, Ninth Circuit, was filed on January 24, 1983. Appendix A, Tribe's Petition at App. 1-19; *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983). The Court of Appeals affirmed the district court's judgment in all respects material to the instant petition. No petitions for rehearing were filed by any of the parties in the case.

5. ACTIVITIES SUBSEQUENT TO THE COURT OF APPEALS PROCEEDINGS

No petitions for certiorari were filed with this Court by any of the parties to the action.

On April 23 (Saturday), 1983, the Pyramid Lake Paiute Tribe of Indians' Petition for Leave to Intervene and Petition for Writ of Certiorari to the United States Court of

Appeals for the Ninth Circuit was docketed in this Court. A copy of that petition was received by counsel for Truckee-Carson Irrigation District on April 28, 1983. On May 3, 1983, the district court filed an Order on Mandate in the case. *See* Appendix A attached hereto.

6. A BRIEF DESCRIPTION OF THE NEWLANDS PROJECT

Under the Reclamation Act of June 17, 1902, the United States, on July 2, 1902, withdrew from public entry the lands in Nevada required for the government's first reclamation project, now known as the Newlands Project. Thereafter, the project was constructed and currently provides irrigation water to 73,002 acres of project lands. These lands and the water rights appurtenant thereto are owned by the project farmers. The Newlands Project draws water from two rivers, the Truckee and the Carson, both of which originate in the Sierra Nevada Mountains in California. On a long term basis, each river contributes about 50% of the project's water supply. The Truckee River is the major contributor in dry years and the Carson River is the major contributor in wet years. *See generally* 1979 RT Vol. VIII, pp. 846-848; 1979 Exhibit 39.

The project works include Derby Dam on the Truckee River (about 25 miles below Reno and 30 miles upstream from Pyramid Lake); the Truckee Canal, which is a 32.5 mile canal leading to Lahonton Reservoir; a small diversion dam on the Carson River and Lahonton Reservoir, which has a storage capacity of 317,280 acre feet. The waters of the Truckee River are diverted at Derby Dam into the Truckee Canal. Those waters are used to irrigate the project's 6,347.79 acre Truckee Division or are carried to La-

honton Reservoir. The waters of the Carson River are diverted to Lahonton Reservoir by the small diversion dam. The project's 66,654.21 acre Carson Division is irrigated by the commingled waters of the Truckee and Carson rivers that are released from Lahonton Reservoir. *See generally* 1979 RT, Vol. VIII pp. 812-813; 1979 Exhibits 32 and 35.

7. THE TRIBE HAS NO INTEREST IN THE WATERS OF THE CARSON RIVER AND THE DECISION OF THE COURT OF APPEALS DOES NOT ADVERSELY AFFECT THE TRIBE'S RIGHTS

The fundamental fact which the Tribe does not face up to is that this is a lawsuit to quiet title to the waters of the Carson River. Pyramid Lake and the Indian Reservation are not within the Carson River watershed. They are situated entirely within the Truckee River watershed, and the Tribe's claims of right to use water on the Reservation including its claims of right to use water for fish flows and at Pyramid Lake are directed to the waters of the Truckee River. None of the waters of the Carson River have ever been diverted to the Reservation, and the Tribe does not claim a right to use the waters of the Carson River on the Reservation, or at all. The Tribe thus cannot assert any legally cognizable interest in the waters of the Carson River.

The Tribe attempts to sidestep its lack of interest in the litigation by claiming that a Carson River water duty for the Newlands Project of 3.5 and 4.5 acre feet per acre rather than 3.0 acre feet per acre will result in the loss of Truckee River water which would otherwise flow to Pyramid Lake. This is not correct. In the first place, the project water duty applicable to the *Truckee River* was

adjudicated in the *Orr Ditch* case. *See United States v. Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. 1944). That water duty is 3.5 acre feet per acre for the bottomlands, and 4.5 acre feet per acre for the benchlands. 1979 Exhibit 53, pp. 10-11. A determination of a lesser water duty for the Carson River, not based on beneficial use, but on a water duty limitation in some of the old water right applications, would not and indeed could not affect the previously adjudicated 3.5 and 4.5 acre feet per acre water duty for the Truckee River which was fixed in the 1944 *Orr Ditch* final decree.[1]

In fact, a 3.0 acre feet acre water duty for the Carson River would only *increase* the project's Truckee River diversions. As the record in this case shows, the Newlands Project farmers' water duty has always been 3.5 acre feet per acre for the bottomlands, and 4.5 acre feet per acre for the benchlands. 1979 RT Vol. VIII, pp. 840-842. A 2.92 or 3.0 acre foot per acre water duty for the Newlands Project has never been implemented or followed. Not by the Watermaster, not by the Truckee-Carson Irrigation District, and not by the United States. Appendix A, Tribe Appendix at App. 9; 1979 RT Vol. V, pp. 475-476; 1979 RT Vol. VIII, pp. 840-842. As the record in this case amply shows, a 3.5 and 4.5 acre foot per acre water duty has consistently been utilized, the water drawn in approximately equal proportion from both Carson River and Truckee River waters. 1979 RT, Vol. VIII, p. 848; 1979 Exhibit 39. If the

---

[1]The water duty determined for project lands in *Orr Ditch* is not among the issues which could be affected by the pending case of *Nevada v. United States of America* No. 81-2245 or the consolidated cases of *Truckee-Carson Irrigation District v. United States of America* No. 81-2276 and *Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District* No. 82-38.

water from the Carson River were limited to the 3.0 acre foot per acre water duty urged by the Tribe, the Newlands Project would have to take more water from the Truckee River in order to satisfy the reasonable and beneficial water duty of 3.5 and 4.5 acre feet per acre adjudicated in *Orr Ditch*. A reduction in the project's *Carson River water duty* from 3.5 and 4.5 acre feet per acre to 3.0 acre feet per acre could thus only result in *increased Truckee River diversions* to the project. That would deprive Pyramid Lake of water that it has been currently receiving, a result which no one desires.

Finally, if the Tribe does have a *right* to use Truckee River water for Pyramid Lake, the project's water duty is of no relevance at all. Obviously, if the Tribe eventually wins *United States v. Truckee-Carson Irrigation District,* 649 F.2d 1286 (9th Cir. 1981), *modified,* 666 F.2d 351 (1982), *cert. granted sub. nos.* 81-2245, 81-2276 and 82-38 (1982), and it is determined that the Tribe has a reserved water right with an 1859 priority to the waters of the Truckee River for Pyramid Lake, that right would have to be satisfied before *any* water could be diverted from the Truckee River to the reclamation project, for the project's water right under the 1944 Final Decree in the *Orr Ditch* case has a 1902 priority.

In brief, the rights of the Pyramid Lake Indians to use the waters of the Truckee River for Pyramid Lake cannot be impaired by this case. The decision of the Ninth Circuit Court of Appeals will not take water from Pyramid Lake. The Indians' claims are to the waters of the Truckee River. Nothing that has been decided in this case can possibly affect those claims. The Indians have no rights to protect in this case and intervention is improper.

8. THE LOWER COURT'S DETERMINATION OF THE NEWLANDS PROJECT WATER DUTY WAS IN ALL RESPECTS PROPER

Many of Tribe's evidentiary statements (at pages 18-26) are not only unsupported by the record but are often contradicted by the evidence that was received. The evidence that was introduced in the trial of this case as to project water duty is as follows:

In the 1929-1940 trial, the government called two witnesses who testified as to project water duty. The first, Alfred W. Walker, was the then Project Manager who had substantial experience with reclamation projects and irrigation, including soils classification. 1929 RT, Vol. 1, p. 220. He recommended in his testimony a water duty for the project lands of 3.5 acre-feet per acre for the bottomlands and 4.5 acre-feet per acre for the benchlands. 1929 RT, Vol. 1, pp. 235-236, 1929 RT, Vol. 2, p. 334.

The second, Professor S. T. Harding, relied primarily on a 1909 soils classification study for his testimony that the *average* water duty for 80,000 acres in the north and south units of the Carson Division of the Newlands Project was 2.92 acre-feet per acre. 1929 RT, Vol. 3, pp. 660-669. However, Mr. Harding recommended specific project water duties ranging up to 4 acre-feet per acre for ten different types of soils. *See* 1929 RT, Vol. 3, pp. 661-669.[2]

In sum, *both government witnesses* at the earlier trial recommended water duties in excess of 3 acre-feet per acre for project lands. One recommended 3.5 and 4.5 acre-feet

---

[2]These water duties are also shown on Mr. Harding's exihibit which was received in evidence as Plaintiff's Exhibit No. 14. *See* 1929 RT, Vol. 3, p. 669; Tables 1 and 2 of 1929 (Plaintiff's) Ex. No. 14.

per acre. The other recommended from 2.5 acre-feet per acre to 4 acre-feet per acre.

In the 1979 trial, TCID's evidence of project water duty ranged from 3.5 acre feet per acre for the bottomlands and 4.5 acre feet per acre for the benchlands to 5.7 acre feet per acre for all the project lands. The government's evidence, when corrected to reflect field conditions and current crop yields, supported a project water duty consistent with TCID's evidence, as the Ninth Circuit specifically pointed out in its opinion. Exhibit A, Tribe's Appendix at App. 11-12; Exhibit F, Tribe's Appendix at App. 93.[3]

Significantly, the project water duty determined by the Special Master after trial and later incorporated into the consent decree in the *Orr Ditch* case was also 3.5 and 4.5 acre feet per acre. 1979 Exhibit 53, pp. 10-11.

Finally, neither the United States, nor the Tribe as amicus, argued on appeal to the Ninth Circuit that the district court clearly erred in its factual determination of water duty required for beneficial use. Because both lower courts considered the effect of the water service contracts and considered (and rejected) allegations of waste and inefficiency in arriving at their determination of this factual issue, no further review is warranted by this Court.

The Tribe contends that the Ninth Circuit Court of Appeals erred in refusing to accord controlling effect to the 3.0 acre foot per acre water duties specified in some water

---

[3]In fact, with these adjustments the United States' evidence reflected a project water duty of 3.97 acre feet per acre which is slightly *higher* than the overall project water duty of 3.71 acre feet per acre that results from the 3.5 and 4.5 acre feet per acre determination. 1979 Exhibit 41.

service contracts between project landowners and the United States, either as controlling contractual provisions or as "administrative determinations."

Section 8 of the Reclamation Act, which this Court has termed "a restraint on the Secretary", *California v. United States,* 438 U.S. 645, 678 n.31 (1978), provides that "beneficial use shall be . . . the measure . . . of the right . . .", 32 Stat. 388, 43 USC 372. Every court which has considered the issue has refused to permit the Secretary to impose contractually any more restrictive measure. *See Ickes v. Fox,* 300 U.S. 82 (1937), *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir. 1943), *Lawrence v. Southard,* 192 Wash. 287, 73 P.2d 722 (1937).[4] In accordance with this body of law, the Ninth Circuit held that beneficial use was the sole and controlling measure of the Newlands project water rights, notwithstanding the reference to specific water duties contained in some of the water service contracts.

The Ninth Circuit further held that because of the lack of uniformity among the contracts on the subject of water duty, as well as the lack of enforcement of any water duties contained therein, the water service contracts could not be given any weight as "administrative determinations" of the amount of water necessary for beneficial use. In the Tribe's view, in refusing to accord them such weight, the judiciary "usurps far too much of the authority granted the Secretary to resolve these [beneficial use] matters." Tribe's Petition at 23.

---

[4]In *Ickes v. Fox,* this Court denied rehearing despite the United States' acknowledgment that the Court's decision "gives applicants, on the sole basis of prior deliveries of water, a vested right in a larger amount of water than was stipulated in their contracts." *Ickes v. Fox,* 300 U.S. 640 (1937), *see* also *Fox v. Ickes,* 137 F.2d 30, 33. (D.C. Cir. 1943).

The Tribe's view of the project contracts as *ipso facto* administrative determinations of beneficial use, insulated from court review, must be rejected for two reasons. First, to adopt its view would strip the courts of virtually all power to review water duty limitations set by the Secretary, a jurisdictional limit which is clearly inappropriate, given the clear standard established by Section 8 for measuring such rights.[5]

Second, and more importantly, the court below did not hold that the Secretary may not administratively determine beneficial use, nor that if he did so the courts would be free to disregard such a determination. Instead it held that "*in the absence of* any earlier administrative or judicial determination of beneficial use," the court was free to make a *de novo* determination of the factual issue based on current information. Appendix A, Tribe's Appendix at App. 8, emphasis added.

The courts below were clearly correct in disregarding the contracts as constituting any sort of expression of agency determination of the amount of water needed for beneficial use. There is no evidence that the figures were the result of

---

[5]The 3.0 acre foot per acre water duty contended by the Tribe would not survive even the limited judicial review it urges. Its inclusion in some contracts and omission from others was clearly arbitrary and capricious. Further, it was not the product of any factual investigation concerning water duties but was included in contracts without consideration of soil type or crop patterns or any other relevant factors. Finally, the evidence shows that a 3 acre foot per acre water duty would not provide even enough water to satisfy the crop *consumptive use*, excluding conveyance losses and regardless of conservation efforts. Appendix F, Tribe's Appendix at App. 93-94. Thus, the Tribe's contention that there is no evidence that a 3.0 acre foot per acre limitation would be arbitrary, capricious and an abuse of discretion is just plain wrong.

any fact-finding endeavor by the government. Most of the contracts contain no reference to water duty at all, but merely provide for beneficial use as the limit of the project water right. *See* 1979 Ex. No. 38, Agreements of Larson, Hardy, Smith and Merritt. Moreover, of the two types of agreements which do mention a specific water duty, only one even purports to limit the amount of the project right. *See* 1979 Ex. No. 38, Christensen Agreement. The other merely defines the amount of water the United States will deliver *without charge*. *See* 1979 Ex. No. 38, Leet Agreement.

Furthermore, any specific water duties contained in the contracts were rendered meaningless by the contract modifications resulting from the execution by the United States and TCID in 1926 of the agreement for TCID's management and operation of the Newlands Project. As part of that 1926 agreement, project landowners were required to execute a document formally consenting to its terms. The consent expressly provided that the 1926 contract would "constitute a modification of the landowners' contract relations with the United States." 1979 Ex. No. 7. In turn, the 1926 contract expressly provided that the project lands "shall have a prior right to the economical and beneficial use of all such waters [of the Truckee and Carson Rivers] *in sufficient quantity to properly irrigate* 87,500 acres of land." 1979 Ex. No. 7, Art. 35; emphasis added.

Finally, the uncontradicted testimony in this case was that water deliveries have never been restricted to 3 acre feet per acre, even when the United States operated the project. 1979 RT, Vol. VIII, p. 841. Indeed, the Secretary stipulated to a higher water duty for the same project lands in the case of *United States v. Orr Water Ditch Company*. 1979 Ex. No. 53.

Such lack of uniform policy, lack of implementation or enforcement, and nearly contemporaneous adoption of another, inconsistent, water duty limitation for the *same lands* clearly negates any inference that the contract amounts were intended by the Secretary to be an "official" determination of beneficial use. The courts below were correct in so finding.

The offhanded manner in which the water duty figures were arrived at and the haphazard manner of their inclusion "in scattered contracts" on the Newlands project demonstrates the unwisdom of the rule of complete judicial deference to such figures which is urged by the Tribe.

In support of its petition, the Tribe has contended that the decision below should be reviewed and reversed because (1) it would create confusion and uncertainty in water rights by casting doubt on the validity of limits contained in reclamation water right contracts, and (2) because it overlooks this Court's emphasis on water conservation as a strong public policy.

It is highly unlikely that any uncertainty or confusion will be created as a result of the Ninth Circuit's decision. Reclamation rights will continue to be subject to the limitation of beneficial use, the same limit the Tribe contends is embodied in reclamation contract provisions. TCID is unaware of any other project in which water deliveries or entitlements are being restricted below the amount which project users claim necessary for beneficial use, nor has the Tribe cited any.[6] The Ninth Circuit's opinion is in full ac-

---

[6]*Westlands Water District v. United States,* 700 F.2d 561 (9th Cir. 1983), cited by the Tribe, does not involve the issue of beneficial use or water duty on project lands, and there were no contracts between landowners and the United States in that case.

cord with existing statutory and case law and has no substantial impact on existing water rights which would warrant further consideration by this Court.

Petitioner's argument that the Ninth Circuit's decision inadequately considers water conservation is simply wrong. The Ninth Circuit opinion expressly recognized that waste, including unreasonable conveyance losses and use of cost ineffective methods, and consideration of competing alternative uses of the water must be taken into account in determining beneficial use. It specifically found that the district court "made no legal error in defining beneficial use", Appendix A, Tribe's Appendix at App. 13, and noted that neither the United States nor the Tribe had argued on appeal that the district court's findings of fact were clearly erroneous. Appendix A, Tribe's Appendix at App. 12.

The court went further, however, and examined the evidence below on the issue of reasonable beneficial use and found that "the evidence presented by the United States was in broad agreement with that presented by TCID", Appendix A, Tribe's Appendix at App. 11-12, and that the evidence below indicated "that a reduction to the 3.0 acre foot per acre water duty sought after by the United States would drastically reduce the farmers' yields over the long term." *Id.* Thus, the courts below both apparently found that reduction of water duty to the 3 acre feet per acre argued by the Tribe would constitute not "water conservation", but a substantial loss of water rights which could

not be compensated for by increased agricultural efficiencies. This court should not grant certiorari merely to review the lower court's factual determination of the unavailability of water conservation savings.

9. THE COURTS BELOW ACTED PROPERLY IN PROVIDING THAT APPLICATIONS FOR CHANGE IN PLACE OF DIVERSION OR MANNER OR PLACE OF USE OF PROJECT WATER RIGHTS SHALL BE INITIALLY SUBMITTED TO THE NEVADA STATE ENGINEER

In the Administrative Provisions of the decree, the district court provided that application for change in place of diversion, or manner or place of use of all the adjudicated rights in Nevada should be initially directed to the Nevada State Engineer. The decree then provides that any dissatisfied party can challenge the Nevada State Engineer's decision in the federal district court in Nevada.

The Ninth Circuit Court of Appeals upheld this procedure noting that the United States was not concerned with routine change applications of project water rights and that the state procedures with the right of review in the district court provide ample safeguards to assure that "admitted federal interests in the federal reclamation project" are protected. Appendix A, Tribe's Petition at App. 13-15.

The Tribe challenges these provisions contending that it has an interest in prohibiting changes which enlarge

project uses, and that the Secretary of the Interior should monitor changes in place and manner of use of project water rights. Tribe's Petition at 27. Addressing the last point first, the Secretary will receive notice of all change applications regarding project water rights and is privileged to present his views to the Nevada State Engineer in the initial proceeding, and then to the district court if he chooses. There is just no reason to assume that legitimate federal interests will not be fully protected under the change application procedure established by the district court. Secondly, the Tribe's concern that change applications will enlarge project uses is ill conceived. The only purpose of the district court's determination of consumptive irrigation water use (2.99 acre feet per acre for the project lands and 2.5 acre feet per acre for the lands above the project) was to assure that any change in place of diversion or manner or place of use would *not* enlarge the water use. Appendix F, Tribe's Appendix at App. 105. Bluntly stated, no application for change in place of diversion or manner or place of use could enlarge the former water use.

The government did not challenge in this appeal the district court's determination that the water rights on the Newlands Project are appurtenant to the land irrigated, *that those water rights are owned by the individual farmers*, and that the United States' interest is only that of a lien holder to secure repayment of project construction costs. Appendix F, Tribe's Appendix at App. 71. The type of change applications that are usually submitted by the project farmers concern changes in point of diversion on project lands or changes in place of use to other project lands. These types of changes do not impinge any con-

ceivable congressional directive and they have no effect at all on the government's lien, for in almost all instances the farmer has already paid in full the project construction costs allocated to his project land. 1979 RT, Vol. VIII, pp. 860-861. If a project farmer seeks to change the point of diversion of his project water right on his project lands or seeks to change the place of use of his project water right to other project lands, why shouldn't the application be submitted initially to the Nevada State Engineer for approval?

Most applications for changes in place of diversion, place of use or manner of use of water are relatively routine and non-controversial and can be expeditiously processed by the state official charged with such responsibility under state law. This, we submit, is consistent with the provisions of Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, which provide that the Secretary, in carrying out the provisions of the Reclamation Act, "shall proceed in conformity" with the laws of the State. *See also California v. United States,* 438 U.S. 645 (1978).

If a case does arise where the Nevada State Engineer approves a change application which violates an express congressional directive in the Reclamation Act, the United States (and TCID) could have that decision immediately reviewed by the district court and presumably corrected.

We submit that in an overall quiet title water right suit where the court has appointed a Watermaster to administer its decree and has retained continuing jurisdiction of the case, it is preferable to have all change applications processed uniformly. No prejudice to the United States has or will result from that procedure.

CONCLUSION

The Tribe, a non-party, has no interest in the waters of the Carson River, the subject of this quiet title action. The project farmers' water duty was correctly determined by the courts below. The procedure established by the district court and upheld by the Court of Appeals for processing applications for changes in manner and place of use is consistent with Section 8 of the Reclamation Act of 1902, and all legitimate federal interests will be recognized and protected under that procedure. Thus, the Tribe's petition for leave to intervene and for a writ of certiorari is without merit. We respectfully urge that the petition filed by the Tribe be denied.

Respectfully submitted,

JOHNSON & ADAMS, LTD.
JAMES W. JOHNSON, JR.
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation
FREDERICK G. GIRARD*
JANET K. GOLDSMITH
ANDREA M. MILLER
ROBIN LESLIE STEWART
*COUNSEL OF RECORD
Attorneys for Truckee-Carson Irrigation District

Appendix A

CASE NO. CV-D-183-BRT

In the United States District Court
For the District of Nevada

United States of America,
Plaintiff/Appellant

vs.

Alpine Land & Reservoir Co., et al.,
Defendant/Appellee.

FILED: May 3, 1983
Clerk, U.S. District Court
District of Nevada

ORDER ON MANDATE

The above-entitled cause having been before the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals having on January 24, 1983 issued its mandate Affirming as Modified the District Court Judgment, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS

ORDERED that the mandate be spread upon the records of this Court.

IT IS FURTHER ORDERED .....

.....

.....

Dated this 3rd day of May, 1983.

/s/ BRUCE R. THOMPSON
United States District Judge